No. 09-1051

Supreme Court, U.S.
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In The

Supreme Court of the United States

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. A Conflict With A Decision Of Another Appellate Court Is Not Necessary For This Court To Grant Certiorari, As There Are Other Compelling Reasons To Do So.

The Government argues that review by this Court is "not warranted" because the decision of the court of appeals "does not conflict with any decision of this Court or of any other court of appeals." Opp. 12. This Court, however, may grant certiorari where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). A conflict is thus not required before this Court may exercise its discretion to grant certiorari.

The court of appeals in this case decided important questions of federal law regarding the application of the 5-year statute of limitations of § 12 of the Indian Claims Commission Act of 1946 ("ICCA") that have not, but should be, settled by this Court due to their overriding importance to the ability of the Oglala Sioux Tribe and other Indian tribes to assert claims necessary for the preservation of the tribes' and the Nation's Native American heritage.

To wait many years until an actual conflict arises, either between the decisions of two or more courts of appeals, or between the decision of a court of appeals and one or more decisions of this Court, risks irreparable loss of this irreplaceable heritage. Looting and accidental disturbance of burial places and other

Native American sites will not abate in the meantime. The Court should therefore exercise its discretion *now* to decide these important questions of federal law before it is too late to save this country's Native American heritage.

Preservation of this precious heritage is, in and of itself, a "compelling reason" for granting certiorari in this case. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted . . . for compelling reasons.").

II. Certiorari Is Warranted To Review The Question When The Tribe's Duty-to-Consult Claim Accrued For Purposes Of The ICCA.

The Government acknowledges the Tribe's contention that its breach-of-duty-to-consult claim is not time-barred by the ICCA, but then erroneously asserts that "the panel majority did not decide the latter question, *because it concluded that petitioner did not plead any such theory in the district court* or brief it in the court of appeals." Opp. 20. (Emphasis added). While citing Footnote 4 of the panel majority opinion in support of the italicized language, that footnote does not mention the pleadings at all. Rather, it merely states that a breach of a "permanent fiduciary duty of consultation" is "a theory the Tribe . . . never mentions *in its briefs in this court*." *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States Army Corps of Engineers*, 570 F.3d 327,

332 n. 4 (D.C. Cir. 2009) (Pet. App. 10 n. 4) (emphasis added). Contrary to the Government's assertion, the panel majority never concluded the Tribe failed to plead a breach-of-duty-to-consult claim.

Furthermore, notwithstanding the Government's argument to the contrary, Opp. 21, the Tribe's second amended complaint (SAC) *does* specifically mention and incorporate as the basis for the breach-of-duty-to-consult claim the Tribe's aboriginal rights in the ancestral Sioux territory, a vast area of land lying largely outside the Great Sioux Reservation. The SAC alleges that, in a 1965 decision,[1] the Indian Claims Commission ruled that the 1851 Fort Laramie Treaty "recognized the *aboriginal territory* of . . . the seven Teton bands," the Oglala Sioux Tribe being one of these seven bands. SAC, ¶¶ 14, 19, 20 (emphasis added); Pet. App. 62, 64-65. More specifically, the SAC alleges that in its 1965 decision the Commission ruled that Article 5 of the 1851 Treaty "recognized the seven Teton bands' joint and several *aboriginal Indian title to the entire sixty million acre area west of the Missouri River*" described in Paragraph 14(a) of the complaint. SAC ¶¶ 14(a), 20 (emphasis added); Pet. App. 62, 64-65. The SAC also alleges that the Commission in a separate 1970 decision[2] ruled that "the seven Teton bands also held *aboriginal Indian title to the entire fourteen million acre area east of the*

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[1] *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965).

[2] *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419, 424 (1970).

Missouri River" described in Paragraph 14(b) of the complaint. SAC ¶¶ 14(b), 21 (emphasis added); Pet. App. 62, 65.

The SAC further alleges that many of the recreational areas and other lands that are the subject of the Tribe's action lie "within the fourteen million acre area east of the Missouri River referred to in paragraph 14(b)." SAC ¶ 49; Pet. App. 82-83. Specifically, 51 recreational areas and other lands "are located within Oglala aboriginal territory": 18 of such areas and other lands are located within the Great Sioux Reservation "and 33 of such areas and other lands are located outside that reservation but within the fourteen million acre area east of the Missouri River referred to in paragraph 14(b) above." SAC ¶ 40; Pet. App. 76-77. All of these allegations regarding the Tribe's rights in the aboriginal Sioux territory are incorporated by reference into the Tribe's Third Claim for Relief – the breach-of-duty-to-consult claim – which avers that defendants breached their trust responsibility to consult with and accommodate the views of the Tribe prior to taking significant actions regarding all of the aforesaid recreational areas and other lands that are the subject of the Tribe's action. SAC ¶¶ 63-67; Pet. App. 86-88.

The Government argues that the Tribe's principal brief to the court of appeals did not "focus[ ] on" the "aboriginal rights that survived even if the 1889 Act was triggered." Opp. 20-21. However, as Judge Tatel correctly pointed out in his dissenting opinion, *OST of PRIR v. USACE*, 570 F.3d at 335 (Tatel, J.) (Pet. App.

17), the Tribe explicitly argued in its opening brief that it possesses "aboriginal interests in the lands set aside by [the Fort Laramie Treaty of 1851] for [its] occupancy and use," only "*a portion of which* . . . eventually became the Great Sioux Reservation." Appellant's Opening Br., p. 45 (emphasis added) (Pet. App. 165). As Judge Tatel further observed, "the Tribe quite plainly argues" in its opening brief that the existence of these aboriginal interests in lands situated both within and without the Great Sioux Reservation "imposes on the government a 'trust responsibility' to consult with the Tribe before 'taking any significant actions' as to the lands." *OST of PRIR v. USACE*, 570 F.3d at 335 (Tatel, J.) (Pet. App. 17), citing Appellant's Opening Br., pp. 45-47 (Pet. App. 165-169). Also, as Judge Tatel noted, the Tribe's opening brief "quot[ed] the district court's characterization of the third claim as asserting that the government 'owe[s] the Tribe a trust responsibility based upon [its] aboriginal interest in the land at issue.'" *Id.* at 335-336 (Pet. App. 17-18), quoting Appellant's Opening Br., p. 46 (Pet. App. 166) (in turn quoting *Oglala Sioux Tribe v. United States Army Corps of Engineers*, 537 F. Supp. 2d 161, 171 (D.D.C. 2008), *aff'd*, 570 F.3d 327 (D.C. Cir. 2009) (Pet. App. 42)).

The Tribe thus both "pleaded and preserved" its breach-of-duty-to-consult claim, despite the Government's claims to the contrary. *See* Opp. 21, 22 n. 9.

The Tribe's claim for a breach of a common law fiduciary duty to consult, moreover, has substantial merit. Judge Tatel concluded that it was a non-frivolous

claim whose merit had to be assumed for purposes of standing. *OST of PRIR v. USACE*, 570 F.3d at 336 (Tatel, J.) (Pet. App. 18-19). Furthermore, he did not suggest, as the Government misleadingly argues, that the claim "could not" survive a motion to dismiss, *see* Opp. 21, but rather only that it "may" not so survive. *OST of PRIR v. USACE*, 570 F.3d at 336 (Tatel, J.) (Pet. App. 19).

Nor is it true that the the Tribe's duty-to-consult claim finds support in only "a *single decision* by a Canadian *provincial* appellate court," namely *Haida Nation v. British Columbia*, 2002 BCCA 147. Opp. 21 (emphasis added). A duty to consult was also recognized by Canada's highest court, the Canadian Supreme Court, in affirming in relevant part the decision of the British Columbia Court of Appeals in *Haida Nation*. *See Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511. In *Haida Nation* and the companion case of *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, the Canadian Supreme Court "unanimously established for the first time that both [Canada's] federal and provincial governments have a duty to consult and accommodate Aboriginal peoples when making decisions that may adversely affect unproven Aboriginal title and rights claims." Kirsten M. Carlson, "Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title," 22 Ariz. J. Int'l & Comp. Law 449, 474 (Fall 2005).

The Government also fails to recognize that the Tribe *did* in fact "identify" a "principle of this country's Indian law that strongly supports its" common law duty to consult claim. *See* Opp. 21-22. In its Petition, the Tribe pointed out that the federal courts, including this Court, have long recognized "the existence of a guardian-ward relationship between the Government and the Indian tribes." Pet. 23, citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980); *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935); and *Littlewolf v. Lujan*, 877 F.2d 1058, 1063 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990). This "long-accepted concept" has been recognized to involve "requirements of fair dealing and protection." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 130 (1960). More specifically, "this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Seminole Nation v. U.S.*, 316 U.S. 286, 297 (1942); *see also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001) (describing this fiduciary relationship as "one of the primary cornerstones of Indian law").

It is this fiduciary or trust relationship between the United States and its Indian tribes which forms the basis under this country's Indian law for recognizing a common law fiduciary duty on the part of the Government to consult with and accommodate the concerns of the tribes where Government-initiated

actions significantly affect the interests of one or more tribes in their aboriginal territories.

The fact that, as the Government points out (Opp. 22) certain federal statutes currently impose narrowly defined duties of consultation on federal agencies[3] does not undermine the importance of recognizing a broader, common law duty to consult and accommodate before Government takes significant actions affecting the interests of tribes in their aboriginal lands, including especially their interest in preserving their cultural resources and burial places and other Native American heritage sites.

III. The Tribe's Reservation Boundary Claims Are Not Barred By The ICCA.

The Government erroneously argues that the Tribe's reservation boundary claims "fall squarely" within Section 2(3) of the ICCA, covering claims resulting if treaties, contracts, and agreements between the Tribe and the United States were "revised," because a court would have to decide whether to rescind the written consents of the Sioux tribal members, i.e., the quitclaim deeds, on the grounds of fraud,

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[3] The example cited by the Government, 25 U.S.C. § 3002(c)(2) only applies to the intentional removal or excavation of Native American cultural items from Federal or tribal lands, and is not triggered by a transfer of Federal lands to a State or another transferee, as occurred in this case under the Water Resources Development Act of August 17, 1999, Pub. L. 106-53, Title VI, §§ 601-609 (WRDA).

coercion, and bribery. Opp. 14. The Tribe, however, does not seek to "revise" the quitclaim deeds, but rather contends that the deeds do not constitute "satisfactory proof" of the required consents of Sioux tribal members, as required by Section 28 of the Act of March 2, 1889, ch. 405, 25 Stat. 888, 899, because the Crook Commission obtained an insufficient number of valid signatures on the quitclaim deeds. SAC ¶ 29, 31; Pet. App. 70-71, 72, 146-152. While "[t]he President proclaimed those consents to have been proved valid," Opp. 14; *see* Proclamation of President Benjamin Harrison, February 10, 1890, 26 Stat. 1554, his authority to do so was circumscribed by Congress in Section 28, and, absent the presentation of "satisfactory proof," he had no authority to issue such a proclamation. Alternatively, the Tribe seeks not to "revise," i.e., alter or amend the quitclaim deeds, but to rescind those deeds – to declare them void from their inception – on the grounds that facially valid signatures were obtained by duress, coercion, fraud and bribery. SAC ¶ 30; Pet. App. 71-72. In either case, the Tribe's claims are not "encompassed" by Section 2(3) of the ICCA. *See* Opp. 15.

As for the Government's contention that the Tribe's reservation boundary claims arise under Article 12 of the 1868 Fort Laramie Treaty and "thus fall[ ] within" Section 2(1) of ICCA, Opp. 15, concededly the challenged WRDA transfers violated Article 12 of the 1868 Treaty. As Judge Tatel correctly recognized, however, those claims did not accrue until the transfers were initiated in 2002 and are thus not

subject to the ICCA. *OST of PRIR v. USACE*, 570 F.3d at 335 (Tatel, J.) (the Tribe's second claim "focuses on the unlawfulness of the current WRDA transfers, not on the government's failure to remedy a historical wrong") (Pet. App. 15-16). That the 1889 Act "is a nullity that never went into effect" (Opp. 16) is a matter of statutory interpretation, not an historical claim arising under the 1868 Treaty.

Finally, as the Tribe's reservation boundary claims are clearly governed by "existing rule[s] of law or equity," they are not claims "based upon fair and honorable dealings" covered by Section 2(5) of the ICCA, notwithstanding the Government's attempt to so characterize them. Opp. 16.

The Tribe, moreover, is seeking an interpretation of federal statutes and treaties in order to clarify the location of its existing reservation boundaries for the limited purpose of challenging transfers of federal fee lands initiated in 2002 under the WRDA: it does not seek "the restoration of a completely different reservation" (Opp. 18) as it does not seek to adjudicate title to any lands within the reservation boundaries.

IV. The Tribe Has Standing To Pursue Its Reservation Boundaries Claims.

The Government argues that the Tribe "abandoned" any standing argument regarding its reservation boundary claims when it "dropped all counts referring to [the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L.

101-602, 104 Stat. 3048 (NAGPRA)] and other cultural-resources protections" from the second amended complaint.[4] Opp. 22. The SAC, however, continues to refer to NAGPRA and other federal statutes providing cultural resource protection. SAC ¶¶ 43-48, Pet. App. 78-82. As for the Government's contention that, by virtue of Section 605(h) of the WRDA, the transfers will have "no impact" on cultural resource protection, the transfers to the State of South Dakota do result in the termination or dilution of the special trust relationship arising from the Federal Government's ownership and direct management of fee lands within tribal boundaries. *See Quechan Indian Tribe v. U.S.*, 535 F. Supp. 2d 1072, 1109 (S.D. Cal. 2008) While statutory protections and federal agency obligations are continued by Section 605(h), the Federal Government no longer owns or directly manages the lands in question, and the benefit of the fiduciary trust relationship arising out of federal ownership and direct management has been lost, in whole or in large part. This change constitutes a "cession" of land under Article 12 of the 1868 Treaty that is sufficient to show an injury-in-fact that gives rise to standing to sue on the part of the Tribe.

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[4] The Government does not address the Tribe's standing to assert its breach-of-the-duty-to-consult claim, erroneously arguing that the Tribe did not "preserve" that claim. Opp. 22. As discussed above, the Tribe *did* plead and preserve its duty-to-consult claim, pp. 4-9, *supra*.

CONCLUSION

In view of the arguments and authorities set forth above and in the Petition, the Petitioner, the Oglala Sioux Tribe, respectfully requests that this Court grant its Petition and issue a writ of certiorari to the Federal Circuit Court of Appeals.

Respectfully submitted,

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